Supreme Court, U.S.
FILED
FEB 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1231

R. DAVID ELY,

Petitioner,

v.

UNITED PARCEL SERVICE INC.,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Arthur L. Fox II
Alan B. Morrison

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

February 8, 1980

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OPINIONS BELOW

The decision and order of the National Labor Relations Board is officially reported at 234 NLRB No. 85 (1978); it is set forth in Appendices B (ALJ decision) and C (Board decision), *infra* at pp. 3-40. There is no opinion of the Court of Appeals. The Court's order reversing the Board's decision and denying enforcement of its order is not officially reported. The Court's order appears in Appendix A, *infra* at pp. 1-2.

JURISDICTION

The order of the Court of Appeals was filed on October 12, 1979. Mr. Justice Stewart entered an order on January 2, 1980, extending the time to file this petition until February 9, 1980. Accordingly, the Court has jurisdiction to review the Court of Appeals' order pursuant to 28 U.S.C. § 1254 and 29 U.S.C. § 160.

QUESTION PRESENTED

May a Court of Appeals summarily reverse an agency's adjudicative decision, which affirmed the factual findings of an administrative law judge, merely by stating, without explaining, that the decision is not supported by substantial evidence?

STATUTES INVOLVED

Section 10(e) of the Labor Management Relations Act, 29 U.S.C. § 160(e), provides, *inter alia:*

> The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

Section 706 of Title 5, U.S.C. — the Administrative Procedure Act — provides, *inter alia:*

> The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing . . . In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . .

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner R. David Ely was terminated from his job as an over-the-road driver for respondent United Parcel Service ("UPS") in November of 1975. During his ten years with the Company, Ely had filed a substantial number of grievances in his capacity as a union job steward. Several grievances dealt with the right of UPS drivers to make non-scheduled stops to heed nature's calls. One of these grievances, all of which were decided in Ely's favor, provoked a UPS supervisor to say, "We're going to get rid of you . . . we'll find a way." App. 7-8.

Thereafter, Ely's continued insistence that UPS drivers had a right 1) to stop to relieve themselves when necessary, and 2) to make vehicle repairs necessary to meet the Federal Motor Carrier Safety Regulations, became the focal point of a dispute between him and UPS over delays in meeting exceedingly tight Company schedules. The conflict intensified in 1974 when Ely was successful in overturning two disciplinary actions for making unscheduled rest stops. App. 8.

In early 1975, UPS assigned a supervisor to accompany Ely continuously over a period of weeks because he was allegedly a "constant problem," regularly incurring delays which the supervisor admitted were necessary to make vehicle repairs and for rest stops. During this period, the supervisor issued Ely a number of warning letters and told the other drivers, "we're going to get [Ely]." Again, Ely was successful in having the warning letters rescinded. App. 9-10.

Despite the fact that most of the UPS drivers and Company supervisory personnel also made unscheduled

rest stops when on lengthy, over-the-road trips, UPS singled out petitioner Ely for surveillance by supervisors who observed his daily driving routine with stopwatches from unmarked, rented vehicles. As a result, Ely was fired once again for "stealing time in rest areas," and once again his grievance resulted in his reinstatement a month later. App. 11-14. Upon his return to work, Ely was accompanied by a supervisor each day. On the third day, November 5, 1975, Ely told the supervisor as he approached a rest area that he needed to stop to urinate. The supervisor replied, "You do and you are fired." Reluctantly, Ely decided not to stop. Approximately 30 minutes later, when he found that he could contain himself no longer, he urinated in the cab of the truck. Thereafter, Ely was again discharged and, on this final occasion, his grievance was denied. App. 15-20.

B. Proceedings Below

Following his termination, Ely filed charges against UPS with the National Labor Relations Board and a claim for unemployment with the Kentucky Department of Human Resources. After a full hearing in which UPS participated, the unemployment referee issued a decision finding that Ely had not engaged in misconduct.[1] After conducting his investigation, the General Counsel of the

[1]The referee found, *inter alia:*

> The claimant had a right to reasonable break periods. There is no showing that the claimant abused this right, or had an unusual problem that required excessive break times. The supervisor's refusal to let the claimant stop on the return trip November 5, to use the restroom was an abuse of the employer's rights in the employment relationship. It was potentially dangerous to the claimant's health and to the safety of the motoring public on the highway in the path of such a distracted trucker. (General Counsel Exhibit No. 6-C).

NLRB issued a complaint charging UPS with violating section 8(a)(1) and (3) of the Labor Management Relations Act (the "Act"), 29 U.S.C. § 151, *et seq.*, by discriminating against Mr. Ely for engaging in protected activities.

Following an on the record hearing, the administrative law judge issued a decision finding that UPS had violated the Act by engaging "in a pattern of conduct calculated to rid itself of a troublesome activist," by conducting "a program of almost continuous surveillance and harassment of Ely," and finally provoking an incident which would support a discriminatorily motivated termination of Mr. Ely. App. 23-25. In arriving at his conclusions, the administrative law judge resolved a number of credibility issues against UPS. App. 8-16, nn. 6, 8, 10, 11, 15, 17, 18, 19.

On appeal to the NLRB, a two-member majority of the Board affirmed the administrative law judge's findings and conclusion that UPS unlawfully discriminated against David Ely in an effort to deter his protected, concerted activities or remove him from his employment because of his successful efforts in establishing and maintaining various contract rights, including the privilege of making unscheduled rest stops.[2] In a concurring and dissenting opinion, the third member of the Board panel agreed that UPS had threatened and harassed petitioner Ely because of his protected activities, but concluded that his act of "voiding in the cab

[2]The decision further affirmed the ALJ's finding that UPS' actions were also designed unlawfully to eliminate an activist in PROD, an organization which "seeks to promote safe and healthy working conditions for drivers, which goals fall well within any definition of the phrase 'mutual aid and protection' in Section 7 of the Act." App. 26.

of the truck . . . was so opprobrious and reckless" as to supply an independent legal justification for his termination. App. 36-40. The majority opinion rejected this conclusion since it would reward UPS for placing David Ely in a "Catch-22" situation where he had to choose between certain discharge for stopping to urinate, and urinating in the truck. App. 23, 32-35.

The Board's order required UPS, *inter alia,* to reinstate David Ely with back pay. App. 28-31. UPS refused. Accordingly, the General Counsel for the NLRB filed a petition for enforcement of the Board's order, pursuant to 10(e) of the Act, in the Court of Appeals for the Sixth Circuit, and Ely intervened.

In its brief to the Court of Appeals, UPS argued as a matter of law that where an employee has engaged in misconduct, the NLRB is required to shoulder a burden of proving that "but for" the employee's protected activities, he would not have been terminated. The Board and most courts of appeals have required only that the Board prove that the employee's protected activity was *a* motivating factor before finding the discharge to be unlawful.[3] UPS also argued as a secondary point that the Board's decision was not supported by substantial evidence.

The Court of Appeals for the Sixth Circuit denied the Board's petition for enforcement. Its decision, contained in a page and one-half order, did not address UPS' legal argument. Instead, the court merely recited the procedural history, the Board's finding that Ely was discharged because of his protected activities, and UPS' contention that "the record displays substantial evidence

[3]*See e.g., NLRB v. Montgomery Ward & Co.,* 554 F.2d 996 (10th Cir. 1977).

that Mr. Ely was discharged for defying his employer's instructions." The court then concluded summarily that "the record when considered as a whole does not contain substantial evidence to support the Board's conclusion that respondent discharged Ely for his involvement in protected concerted activities."[4] App. 1-2.

REASON FOR GRANTING THE WRIT

The Court of Appeals Has Deviated So Far From the Accepted and Usual Course of Judicial Proceedings As To Call For An Exercise of This Court's Supervision

In reversing a decision of the NLRB on grounds that it was not support d by substantial evidence, but without offering any explanation to support its conclusion, the Court of Appeals has so far departed from the usual, accepted, and indeed necessary, course of proceeding as to call for an exercise of this Court's power of supervision. After an unemployment referee found that UPS' termination of David Ely had been without just cause, and after an NLRB administrative law judge, following a two-day trial, found that Ely had in fact been the object of a blatantly unlawful pattern of surveillance, threats and coercion by UPS, and after the NLRB

[4]The Board's findings and order went considerably beyond the issue of Ely's final termination and required UPS, *inter alia,* to cease and desist threatening and otherwise discriminating against employees for the purpose of discouraging them from engaging in protected activities, a course of unlawful conduct which UPS had pursued for some time. App. 28-31. However, the court denied enforcement of the Board's order in its entirety.

reviewed and unanimously affirmed this finding,[5] the Court of Appeals reversed, without so much as a single word of explanation except to state its conclusion that the record did not contain substantial evidence to support the Board's findings.[6]

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), plainly affirms the courts' right – indeed duty – to reverse decisions of administrative agencies which are not based on substantial evidence in the record. However, to do so without setting forth any reasons is to deviate radically from acceptable judicial process and to justify intervention by this Court. Moreover, while unusual, the method of disposing of the case below is not unique and has been employed by the Sixth Circuit on a number of other occasions to summarily reverse NLRB decisions.[7] Unless this Court intervenes to review this summary procedure, appellate courts will undoubtedly succumb increasingly to its temptations.

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[5]One of the three-member Board panel concluded in a concurring and dissenting opinion that Ely's conduct on November 5, 1975, provided UPS with independent legal justification for terminating Ely in spite of its unlawful motivation. This Board member would have reversed, however, only the administrative law judge's finding that Ely's final termination was unlawful. *See also* n.4 *supra.*

[6]Where findings of fact have been approved or confirmed by reviewing tribunals, the presumption that they are supported by substantial evidence is strengthened. *See FTC v. Standard Oil Co.,* 355 U.S. 396, 401 (1958). *Cf. National Licorice Co. v. NLRB,* 309 U.S. 350, 357 (1940); *Cincinnati H. & D.C. Co. v. ICC.* 206 U.S. 142, 154 (1907).

[7]*See e.g., NLRB v. 212 Auto Sales, Inc.,* 570 F.2d 1304 (6th Cir. 1978); *NLRB v. Gould, Inc.,* ____ F.2d ____, 98 LRRM 2183 (6th Cir. 1978); *North Dixie Theatre, Inc. v. NLRB,* 549 F.2d 414 (6th Cir. 1977); *Taft Broadcasting Co. v. NLRB,* 525 F.2d 687 (6th Cir. 1975); *NLRB v. Chambertin, Inc.,* 448 F.2d 785 (6th Cir. 1971); *Feldkircher Wire Fabricating Co. v. NLRB,* 436 F.2d 1383 (6th Cir. 1970).

There can be no doubt that had the NLRB or some other administrative agency disposed of an adjudicatory proceeding in such a conclusory manner, offering no rationale for its decision, it would have been summarily reversed and the case remanded because "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC V. Chenery Corp.,* 318 U.S. 80, 94 (1943). Similarly, this Court cannot monitor or review, however infrequently, the application of its *Universal Camera* standard by the appellate courts unless they, in turn, supply some explanation of the grounds for their decisions.

Not only does a judicial opinion reversing an administrative adjudication set forth the grounds for possible review by this Court, it also explains to the parties why one of them prevailed. Perhaps even more importantly, an opinion informs an agency which has continuing responsibilities for enforcing a law how it erred so that it may avoid similar mistakes in future proceedings. Each of these separate functions is of vital importance to the sound administration of justice which is thwarted by the Sixth Circuit's practice of summarily reversing NLRB decisions.

On the other hand, when an appeals court affirms or enforces an agency decision without opinion, it implicitly adopts the agency's findings of fact and conclusions of law, or at least it holds that the findings are supported by substantial evidence and that the legal conclusions are sound. Its decision is ultimately reviewable by referring to the agency decision. Obviously this principle does not apply when an appeals court summarily

reverses, since the ultimate disposition of the case is not founded upon any explicated reasoning or analysis.

This maxim has impelled several courts of appeals to specify in their local rules of procedure that summary orders may appropriately be issued only when affirming agency decisions.[8] As the Fifth Circuit observed when announcing and explaining its rule,

> Opinions are to serve a number of purposes . . . . One is that an articulated discussion of the factors, legal, factual or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review.

NLRB v. Amalgamated Clothing Wkrs. of America, 430 F. 2d 966, 972-73 (1970).

To be sure, this Court left little doubt in *Universal Camera* that

[8]Rule 21 of the Fifth Circuit, Rule 14 of the Eighth Circuit, and Rule 17 of the Tenth Circuit, specify that "[w]hen the Court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the Court for decision: . . . that the order of an administrative agency is supported by substantial evidence on the record as a whole, and . . . that no error of law appears and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion."

Other courts of appeals have rules which arguably authorize summary reversal of agency decisions. *See e.g.*, Rule 6(g) of the District of Columbia Circuit, section 0.23 of the Rules of the Second Circuit, and Rule 21 of the Ninth Circuit.

> Whether . . . . there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. 340 U.S. at 491.

However, there is no way this Court can identify those "rare instances" when appellate courts have grossly misapplied the substantial-evidence standard if the courts provide no reasoning upon which review can be based. Nor can this Court determine whether the appellate court has made a "fair assessment" of the record where there is no reasoned opinion. *See FTC v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503 (1951).

In the instant case, for example, it is possible that the Court of Appeals might have adopted UPS' argument, summarized in its order (App. 2), that since substantial evidence supported *UPS'* factual contentions, the *Board's* findings could not also have been supported by substantial evidence. Of course, this rationale would amount to a serious misapprehension of the substantial evidence rule as refined in *Consolo v. Federal Maritime Comm.*, 383 U.S. 607 (1966), where this Court noted that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* at 620. But there is no way to ascertain whether the Court of Appeals based its decision upon this, or any other improper standard. What may have been an erroneous decision becomes immune from review, shielded by judicial silence. If this case was

so easily disposed of that no explanation was required, surely it would not have been unduly burdensome to have written a short opinion "if the matter was dealt with in a conscientious manner in passing on the merits." *Davis v. Clark*, 404 F.2d 1356, 1358 (D.C. Cir. 1968) (Tamm, J.). And if it was not so easy to do, it may well have been because summary disposition was a convenient way to avoid troubling questions.

If this Court is to retain the capacity to monitor judicial application of the substantial evidence standard and perform its responsibility for supervising judicial administration of agency law to assure both uniformity and continued respect for the judicial system, we respectfully submit that it should either grant plenary consideration of this question or summarily reverse and remand the instant case to the Court of Appeals for reconsideration and issuance of a reasoned opinion pursuant to *Universal Camera*.

CONCLUSION

For the foregoing reasons, petitioner R. David Ely respectfully urges this Court to grant a writ of certiorari to review the decision by the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Arthur L. Fox II
Alan B. Morrison
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioner

February 8, 1980

APPENDIX A

[Filed Oct. 12, 1979]

No. 78-1258

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, and REN DAVID ELY, Intervenor, v. UNITED PARCEL SERVICE, INC., Respondent.	)	ORDER

Before: CELEBREZZE and ENGEL, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

This case is before the court on petition of the National Labor Relations Board seeking enforcement of its order against respondent United Parcel Service, Inc., reported at 234 NLRB No. 85, finding respondent in violation of §§ 8(a)(3) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (a)(3). This petition is properly before the court since the alleged unfair labor practices occurred in Lexington, Kentucky. *See* 29 U.S.C. § 160(e).

The Board found that respondent discharged one of its employees, intervenor Ren David Ely, because the employee was a troublesome activist engaging in protected concerted activities in violation of § 8(a)(3) of the Act. Respondent contends that the administrative record when considered as a whole lacks substantial evidence to support the Board's position that Mr. Ely was discharged

because of his protected activities. Rather, respondent contends the record displays substantial evidence that Mr. Ely was discharged for defying his employer's instructions and for engaging in otherwise unprotected activity.

Upon our review of the record before the court, the briefs and oral argument of counsel for the parties, and the court being fully advised in the premises finding that the record when considered as a whole does not contain substantial evidence to support the Board's conclusion that respondent discharged Ely for his involvement in protected concerted activities, Therefore

It is ORDERED that enforcement of the order of the National Labor Relations Board be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED PARCEL SERVICE, INC.

and

REN DAVID ELY, An Individual

Louis Rosner, Esq., and *Earl Ledford, Esq.*, for the General Counsel.
Matthew R. Westfall, Esq., and *W. Bruce Baird, Esq. (Middleton, Reutlinger & Baird)*, of Louisville, KY, for the Respondent.
Arthur L. Fox, Esq., of Washington, D.C. for the Charging Party.

DECISION

Statement of the Case

RICHARD L. DENISON, Administrative Law Judge: This case was tried at Lexington, Kentucky, on July 15 and 16, 1976, based on a charge filed October 31, 1975, as amended December 19, 1975; a complaint issued April 20, 1976, as amended April 21, 1976 and at the hearing, alleging violations of Section 8(a)(1) and (3) of the Act; and an answer dated April 29, 1976, amended July 13, 1976 and at the hearing, denying the alleged violations.[1] Respondent's answer, as amended, also asserted that the Board should defer to the decisions of

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[1]All dates are in 1975 unless otherwise specified.

the Kentucky Joint State Grievance Committee in this matter.

Upon the entire record in the case, including my observation of the witnesses, and upon consideration of the briefs, I make the following:

Findings of Fact

I. Jurisdiction

Respondent, an Ohio corporation,[2] is engaged in the transportation and delivery of goods by truck from various terminals located throughout the United States. Only Respondent's Lexington, Kentucky terminal is involved in this proceeding. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 for customers located outside the State of Kentucky. On the basis of the above facts and in accordance with the admissions in Respondent's answer, as amended, I find that the Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

I find that Teamsters Local Union 651, hereafter referred to as Local 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereafter referred to as the Teamsters, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

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[2]Also referred to herein as "the Company" or "UPS."

III. The Alleged Unfair Labor Practices

A. The Issues

1. Whether the Respondent violated Section 8(a)(1) of the Act by (a) issuing a warning letter to Ren David Ely on or about October 1, (b) discharging or suspending Ely for 30 days on October 2, suspending him again on November 3 and 6, and (c) permanently discharging Ely on November 11, because of his protected concerted activities in filing grievances and asserting what he believed to be other rights of employees under the collective-bargaining agreement between Respondent and Local 651, and because of his activities on behalf of the Professional Drivers Council, otherwise known as PROD.

2. Whether Respondent's conduct in warning, suspending, and discharging Ely, as described in 1. above constitutes discrimination because of his union activities in violation of Section 8(a)(3) and (1) of the Act.

3. Whether, under the circumstances presented, this case is appropriate for deferral to the decisions of the Kentucky Joint State Grievance Committee, concerning the grievances Ely filed over his warning, suspensions, and discharges, pursuant to the Board's policy enunciated in *Spielberg Manufacturing Co.*, 112 NLRB 1080, and *Raytheon Co.*, 140 NLRB 883.

B. Background

Respondent operates a nationwide parcel delivery service, but the only operation involved in this case is the Lexington, Kentucky terminal where approximately 350 employees, including approximately 100 truckdrivers, are employed. All nonsupervisory employees are represented by Local 651, and are covered by the Central Conference of Teamsters United Parcel Service Area

Agreement, and a Local Supplement between Teamsters Local Unions 89, 651 and United Parcel Service, Inc., Kentucky.[3] Article VIII of the Area Agreement describes the procedure for processing grievances, and specifies that a decision at any state shall be final and binding on both parties. Briefly, the stages are: (1) a discussion with the employees' immediate supervisor, or with the grievant, his steward and immediate supervisor; (2) if not resolved in 1 working day, reduction to writing and attempted adjustment with the supervisor; (3) absent agreement the steward reports to the Union who raises the matter in writing with the Employer within 5 days; (4) absent settlement, submission within 15 days to the State Committee or UPS Joint Area Committee; and (5) submission, within 15 days, of grievances which are not resolved at the State Committee level to the Joint Area Committee.[4] Neither company nor union representatives responsible for the UPS operation involved in the grievance under consideration by the Committee, may serve on the panel. Disputes not resolved by a majority decision of the panel and the Joint Area Committee, go before the appropriate UPS Regional Manager and the International Director of the Central Conference of Teamsters for final hearing and decision.

Ren David Ely first became employed by Respondent in September 1966 at its Lafayette, Indiana location. In May 1969 he transferred to UPS's London, Kentucky operation, where Robert Jones, the present Division Manager over the Lexington, Kentucky facility, was

[3]The specific agreement applicable at all times material herein has a duration of from September 1, 1973 to April 30, 1976.

[4] The Joint Area Committee will hereafter be referred to as the J.A.C. The Joint State Committee will hereafter be referred to as the J.S.C. or State Committee.

then employed as supervisor. At London Ely was appointed union steward and in this capacity filed approximately 30 grievances. In early 1972 Ely transferred to Lexington, Kentucky., During his tenure at Lexington Ely filed 39 grievances.[5] In July 1972 Ely and the Company first crossed swords in what became a continuing battle over job safety and the right of employees to take time for nature calls separate and apart from regular breaks. After filing a grievance in July 1972 against Supervisor Smithers for suspending and harassing him for using the restroom, which grievance Ely won, Smithers threatened Ely while they were together at a restaurant saying, "We're going to get rid of you." Ely

[5]At the hearing in this matter, upon objection by Respondent, I rejected General Counsel's Exhibits 11-1 through 11-42, which are 42 grievances Ely filed between February 12, 1971 and November 25, 1975. I likewise rejected Respondent's Exhibits 3 and 4, minutes of the J.S.C. which, although not a complete transcript, set forth the positions of the parties and the Committee's disposition of the grievances directly relating to Ely's warning, suspensions, and discharge. All counsel were advised that upon request in their briefs reconsideration would be given to the ruling excluding these exhibits, and to proceed accordingly in the presentation of their evidence in order to avoid further proceedings. Reconsideration having been requested in the briefs together with supporting arguments, and upon further reflection and consideration concerning the admissibility of such documents in cases with similar issues, I reverse my previous rulings to the extent that I receive General Counsel's Exhibit 11 into evidence, except for General Counsel's Exhibits 11-13, 11-24, 11-39, 11-40, and 11-42 which are for the most part illegible. I note that Respondent's Exhibits 8, 9 and 12 are the same grievances as General Counsel's Exhibits 40, 39, and 42, respectively. I also receive Respondent's Exhibits 3 and 4 into evidence. I am persuaded that these exhibits are admissible for the limited purpose of showing the nature of the various grievances filed by Ely preceding his discharge, and, as to Respondent's Exhibits 3 and 4, the nature of the minutes taken by the UPS Kentucky State Grievance Committee, the positions advanced, and the dispositions.

responded, "It might be a little harder than you think." Smithers answered, "We'll find a way."[6]

Thereafter Ely's aggressive insistence that drivers had the right to stop to relieve themselves whenever necessary gradually became the focal point of the dispute between him and the Company. This situation intensified, basically as the result of (1) the Company's efforts, pursuant to complaints from the UPS North Carolina district in November 1973, to reduce late arrivals at the Trentville, Tennessee meet point near Knoxville, where trailers were exchanged, and (2) two grievance decisions by the J.A.C. in 1974 in grievance cases involving Ely. The first of these cases stemmed from a warning letter Ely received for leaving the interstate highway and for making unscheduled bathroom stops. The Committee's decision in relevant part stated ". . . the grievant is instructed to follow the instructions of his supervisor. Under normal conditions one stop on each leg of the interstate highway should be sufficient. This is not meant to imply that the employee may not heed nature's call. The warning letter shall be rescinded." The second decision, arose from another warning letter and suspension Ely received for failing to follow instructions to leave the interstate highway only once during each leg of his run at highway rest areas. Ely exited the interstate highway once on each leg of his run to use private rest facilities. The J.A.C. decision was, "The claim of the Union is upheld, but employees

[6]Smithers denied the threat, or having a conversation with Ely at all in the restaurant, but avoided relating in his testimony any of the words he necessarily must have had with Ely which gave rise to the grievances Ely filed, and failed to recall a grievance dated July 18, 1972, won by Ely, which charged that Smithers had threatened to discharge him. Since Smithers was not a candid witness I credit Ely, who impressed me as an honest straightforward person with a better than average memory.

are instructed to use restroom facilities which will result in the least amount of lost time."

The 1974 grievances set the stage for the final series of confrontations between Ely and UPS. In order to understand these events it is necessary to examine his work routine. Ely, a feeder driver, successfully bid on the Lexington, Kentucky to Knoxville, Tennessee run in February 1975. The distance from Lexington to the Knoxville terminal is 186 miles, and takes a little over 4 hours to drive. According to credible testimony by Division Manager Bob Jones and Ely, Ely's workday began at 3 a.m. At 3:15 a.m. he was scheduled to leave the terminal, after having received his freight documents, and performing his paperwork and pretrip safety inspection of his vehicle. The scheduled arrival time in Knoxville was predetermined by the Company based on actual driving time which allowed only one 15-minute break plus an additional 5 minutes for a safety inspection. At Knoxville Ely exchanged trailers with another driver from Atlanta. If the Atlanta driver was delayed Ely was required to take his 30-minute lunch period at Knoxville, otherwise he was permitted to take his lunch break whenever and wherever he chose on the return route together with another 15-minute break. After leaving Lexington, it was Ely's custom to drive down interstate 75 to a truck stop at Corbin, Kentucky, where he would take his first allotted break. About an hour later Ely found it necessary to stop to relieve himself. Where Ely made this "unscheduled" stop depended on the type of bodily function he found it necessary to perform. Thus he sometimes stopped at the highway rest area near Jellico Mountain, but if commode facilities were needed Ely had to use a service station restroom just off the interstate at Lake City. On his return trip Ely again took his coffee break at the same truck stop at Corbin, and

thereafter relieved himself at the Berea rest area which had restroom facilities.[7]

Other drivers also made "unscheduled" stops to heed the call of nature. On an infrequent basis supervisors accompanied drivers on their runs. On one such trip Supervisor Givens drove with Philip Vest, and on the return leg from Columbus, Ohio to Lexington Givens made an unscheduled rest stop.

In March and April of 1975 the Company began to closely monitor Ely's daily routine. Feeder Supervisor Darwin Turpin rode with Ely three to four times a week for 3 to 4 weeks during this period. Turpin's explanation for the unusual frequency of his trips with Ely was that Ely had been a "constant problem" in the past concerning his running over the schedule and delays, and Turpin wanted to help Ely improve. However, it was during this same period of time that Turpin caused Ely to receive warning letters, subsequently revoked when Ely won the related grievances. In addition, on or about March 25 while Ely, Turpin and three other drivers were taking a break at the Corbin, Kentucky truck stop, the Cracker Barrel, one of the drivers asked why Turpin was again riding with Ely and hadn't the Company gotten rid of Ely yet. Turpin answered, "No, we're going to get him." In the summer of 1975 Turpin told driver Paul Brown that they would get Ely eventually, after Brown had ribbed Turpin about the number of grievances Ely had won.[8]

[7]It is undisputed that the Jellico Mountain rest area and the Berea rest facility are the only rest locations on I-75 between Corbin and Ely's respective destinations.

[8]Turpin testified that he rode with Ely three times a week during April 1975. His only testimony about a conversation at the Cracker Barrel on or about March 25 was that he had checked the company records (which were not adduced) which showed Ely was not at work *that* day, and that the conversation Ely referred to occurred "probably in April." However, Turpin could remember only a driver named Braden and Ely talking about the Lexington to Knoxville schedule. Turpin did not relate anything he said to the group drinking coffee at the restaurant. His answers on both direct and cross-examination were equivocal, and displayed a poor memory. I credit Ely and Brown.

In June or July 1975 Ely became a member of the Professional Driver's Council (PROD), an organization separate and apart from any labor organization or trucking company, devoted to promoting improved safety and working conditions for truckdrivers. Thereafter Ely distributed PROD membership cards to drivers at the Lexington terminal, and at truck stops during his 15-minute breaks. He also passed out PROD literature and wore a PROD insignia patch (which measures 4 inches in diameter with P-R-O-D in heavy letters one-half inch) on each arm of the jacket which he wore to work. Further discussion of Ely's PROD activities will be recounted chronologically.

C. The Warning Letter Issued to Ely on September 26 and His Discharge on October 2

On September 17 Lexington District Manager Jones was returning from Corbin on I-75 when he observed a UPS tractor-trailer stopped at the Richmond-Berea rest area. Jones testified that he pulled into the rest area to see if there were any mechanical problems or some type of delay. However instead of seeking out the driver, Jones noted the time, 12:05 p.m., and the tractor and trailer number, and then drove past the vehicle to the auto parking area where at 12:15 p.m. he observed a driver he could not recognize leave in the truck. Upon

returning to Lexington a check of the vehicle numbers against the dispatch sheet determined that Ely was the driver. An examination of the tachograph card from Ely's tractor disclosed two unscheduled stops.[9] This discovery caused Jones to issue orders to Feeder Manager James Hatcher that the normal random audit of 20 percent of the tachograph cards be increased to 100 percent. On September 26 the results of the audit were examined and Jones decided to issue warning letters to drivers Ren David Ely, Paul Brown, Herc Henson, Philip Vest, and Charlie Cooper, all of whom were making unscheduled stops on a daily basis. These letters were mailed September 29, and on that morning Hatcher informed the drivers that they would be receiving a warning letter.[10] Ely responded that he had already won two grievances establishing his right to make such stops, and that he did not want to discuss the matter further without a union steward present. Hatcher retorted,

[9]Tachograph cards do not show the nature of the stop.

[10]Both Ely and Brown testified that Hatcher told them they would be receiving warnings about their "p--s stops." Hatcher credited Ely with this characterization. I credit Ely and Brown. I also credit Brown's testimony that while riding with him on a trip to Columbus on September 16, in response to Brown's question about why Jones and Ely couldn't get along, Hatcher commented that it was f---ing up his operation but it seemed to be an obsession with Jones to get Ely. Hatcher admitted talking freely to Brown on the Columbus trip about the clash between Ely and Jones, but denied making the remark Brown attributed to him. Brown impressed me as an honest straightforward witness. He and other driver witnesses still employed by the Company at the time of the hearing had much to lose by testifying as they did. His demeanor and manner of phrasing his answers did not convey the impression that he was particularly friendly toward Ely. Hatcher, on the other hand, impressed me as a witness who was uncomfortably trying to please his superiors. Portions of his testimony conflicts with that of Ely and other driver witnesses, I credit their testimonies instead of Hatcher's.

"Well, you stop and we'll get you." Ely cut off further discussion by starting the engine and rolling up the window.

Further examination of Ely's time and tachograph cards on September 29 and 30 revealed Ely had continued to make his same unscheduled stops. Pursuant to orders from Jones, Hatcher and another supervisor followed Ely on October 1, timed his stops with a stopwatch from a concealed position, and reported that Ely had made his usual unscheduled rest stops. Their observations at the Jellico Mountain stop confirmed that Ely had in fact relieved himself. As he was leaving the Richmond-Berea restroom Ely said hello to the girls at the information counter.[11] On October 2 Hatcher watched Ely again. Ely made the same unscheduled rest stops at Jellico Mountain. Hatcher, who arrived before Ely, observed Ely walk around the unit making his safety check but insisted Ely did not relieve himself. Hatcher did not "observe" that Don Branham, another UPS driver who arrived immediately before Ely, parked his unit beside Ely's and left when Ely left. Branham was also present later when Hatcher observed Ely at the Richmond-Berea facility. Hatcher did not question or report Branham when he briefed Jones on Ely's activities that day.

Upon his return to the terminal on October 2 Ely was terminated by Jones for dishonesty in stealing time at rest areas. Jones emphasized Ely's "talking" with the in-

[11]Respondent attempted to create the impression that Ely dallied at the information counter. Subsequent actions by the Company emphasized his remarks in passing the counter as an example of time wasting. But Hatcher testified that the total stop at the rest area was 7 minutes which hardly comports with his testimony that Ely talked with the girls for a "few minutes." The supervisor who accompanied Hatcher did not testify.

formation counter girls.[12] Immediately after this interview Jones met with driver Paul Brown and agreed to withdraw his warning letter. At the beginning of their meeting Jones emphasized that Brown should not take unscheduled stops, but before the meeting ended Jones told him he could stop when he wanted to, but not too much, to make the schedule, and do his job.[13] On October 3 Ely filed a grievance, received by the Company October 6, requesting rescission of his warning letter. That same day Brown, Henson, Vest and Cooper attempted to obtain clear instructions from Hatcher concerning the Company's position on unscheduled stops. Since Brown's warning letter had been rescinded, the other drivers wanted their letters withdrawn. Vest argued that their issuance violated the J.A.C. decisions concerning this topic. Hatcher replied that they could go ahead and make stops when necessary, but not to stop at the same rest area continually. On October 7 all the remaining September 26 warning letters were unconditionally rescinded, except Ely's whose remained in effect.[14] The grievance Ely filed concerning the letter was denied by the State Committee on October 17, but the grievance he had filed October 4 concerning his discharge resulted in an award reducing the discipline to a 30-day suspension with the admonishment to discon-

[12]A discharge for dishonesty does not require a warning letter, as Jones reminded the union steward who was also present at this meeting.

[13]Brown testified that his reaction to Jones' remarks was "He just left me half hanging on it." Brown also noted that he had been making the same unscheduled stops for 2 years, even when accompanied by supervisors, including Turpin and Hatcher.

[14]The Union's steward, Ken Howard, took the position in a meeting with Jones on this date that since Jones had rescinded Brown's letter, all the warnings should be withdrawn.

tinue taking excessive breaks, and to consult his physician *if* he was suffering from a physical ailment.

D. The Suspensions of November 3, and 5 and Other Events Leading to Ely's Discharge on November 11

Ely returned to work on November 3 at 2:30 a.m., one-half hour early, wearing his jacket with the PROD arm patches, and headed for the lunchroom where he talked to drivers Paul Brown, Cooper, Branham, and Henson about PROD and gave them PROD literature. Hatcher and Mulvaney were also in the lunchroom a few feet away during this time, but left shortly thereafter.[15] At 3 a.m. Hatcher announced he would ride with Ely. Ely made his pretrip inspection and started for the shop, explaining that he'd discovered loose lug nuts on the wheels, an engine sound which caused him to suspect a loose fan belt, a tail light out, and missing valve caps on the tires.[16] Hatcher retorted, "If you're going to run to the shop the first thing, you can just go to the house."[17] At the shop Hatcher said he

[15]Hatcher and Mulvaney denied that Mulvaney was present in the lunchroom. I credit Ely's testimony supported by that of Paul Brown who added that Hatcher and Mulvaney left the lunchroom frowning and obviously "mad."

[16]Department of Transportation regulations and Company safety policies require that a mechanic examine any defects revealed by the pretrip inspection.

[17]Hatcher denied making this statement. He at first supported Division Manager Jones' prior testimony that Ely had refused to drive the truck without valve caps, but on cross-examination Hatcher admitted that Ely had not refused. Throughout their testimonies Hatcher and Jones displayed a propensity to distort the truth. Consequently, where their testimonies conflict with that of Ely and other drivers, I credit the employees' versions except where otherwise noted.

would allow the lug nuts to be fixed, but would not worry about the valve caps. Ely then reached for his tape-recorder-player and asked Hatcher to repeat what he'd said. Hatcher ordered Ely to remove the tape recorder from the cab and leave it behind. Ely refused and was sent home.[18] That afternoon Hatcher phoned Ely, and said he'd been suspended for the day but that he would make his run the next day.

On November 4 Jones and Hatcher assigned Feeder Supervisor Neil Mulvaney to ride with Ely to perform a "road test and observe his driving." Actually, as he later conceded, Mulvaney was watching for unscheduled stops. Ely reported for work at 2:30, changed clothes and went to the lunchroom where he distributed PROD literature again. Thereafter he learned Mulvaney would accompany him, pretripped his unit, and left for Knoxville. During the southbound leg of the trip near London Ely raised the subject of PROD. Mulvaney asked, "What is that c--p?" Ely responded that it was for the safety, health, and benefit of truckdrivers, and provided them with information about the Company and the Union. Mulvaney wanted to know if Ely got a kickback from PROD, and Ely said he did not. Then Mulvaney said, "Well, you keep that s--- up and we're going to get you."[19] Ely made two unscheduled rest stops, one on each leg of the trip at the points where he had stopped

[18]Hatcher testified that a notice had been "posted way back in the spring that nothing was to be carried in the tractor except AM-FM radios, but on cross-examination he conceded that the notice related to drivers installing CB radios to which the Company had been opposed.

[19]Mulvaney, who recounted in detail other events of the trip, answered "Not to my recollection." When he was asked by Respondent's counsel if the subject of PROD came up, he testified he was certain that he did not threaten Ely. I credit Ely's testimony.

in the past. Mulvaney joined Ely in his unscheduled stop on the return leg. Upon returning to the terminal Mulvaney reported the results of the road test and the day's events to Jones who decided that Hatcher would ride with Ely the following day.

On November 5 Ely stopped at Jellico Mountain to relieve himself, and Hatcher said he would fire Ely if he did that any more because it wasn't consistent with panel decisions.[20] Ely answered that he had to relieve himself and that in his opinion it was consistent with panel decisions. While taking their regular break Ely showed Hatcher his PROD literature. On the return trip Ely and Hatcher saw driver Philip Vest stopped at Jellico Mountain. Later Vest caught up with Ely and Hatcher during their regular coffee break at the Cracker Barrel. Ely made a point of mentioning Vest's unscheduled stop and Vest acknowledged that he'd pulled off the road to relieve himself and to check his tires.[21]

Back on the road again, as they approached the Berea rest area, Ely told Hatcher he had to stop, but Hatcher answered "You do and you are fired," and Ely drove on. Fifteen to thirty minutes passed and they reached the exit ramp at I-75 and Newton Pike. At this point Ely remarked that he had to urinate now, and proceeded to do so in the cab of the truck as he steered with one

[20]On November 5 Respondent received a copy of the unfair labor practice charge which Ely filed against the Company on October 31.

[21]The record shows that during the conversation Hatcher attempted to signal Vest to conceal the real purpose of his unscheduled stop by interjecting a question concerning whether the stop was for the purpose of checking his tires. Vest ignored the obvious invitation and responded truthfully.

hand down the curved exit ramp. A startled Hatcher yelled for him to watch out as the truck swerved across the crack between the edge of the ramp and the concrete shoulder. As they halted at the stop sign at the bottom of the ramp Hatcher exclaimed, "David, I don't believe you did that!"[22] A few minutes later at the terminal Hatcher notified Ely of Jones' decision to suspend him and instructed him to see the company physician, Dr. Ted D. Ballard, on Friday, November 7. In the meantime Ely telephoned Dr. Stephen Vaught, a urologist at the University of Kentucky Medical Center and described his work routine, coffee drinking habits, and rest stop habits. Vaught advised Ely that there was nothing wrong with him, and not to waste his money on an office visit. On the 7th Ely went to the terminal between 11 a.m. and 12 p.m., picked up his paycheck, and headed toward the lunchroom when Jones appeared and asked what he was doing there. Ely responded he had come to get his paycheck and hand out some PROD literature. Then Jones escorted Ely off the property saying, "That is not company stuff and that is not union stuff and I don't want that s--- on this property.[23]

A couple of hours later, Dr. Ballard began his examination of Ely with the remark, "I understand you have a kidney problem." Ely answered, "Not to my

[22]At the end of his testimony describing the incident Hatcher added the observation, "You know — what do you do? What do you say?"

[23]On November 7 several other drivers including Vest, Branham, and Brown received another warning letter for unscheduled stops. Subsequently, no further disciplinary action was taken by the Company against these drivers despite the fact the unscheduled stops continued. One further "warning letter" was issued on March 29, 1976. However, the wording of this letter is contradictory in that it purports to rescind the warning.

knowledge." At the conclusion of the examination Ballard told Ely, "I can't find anything wrong with you. You are going to have to go to a specialist. Ely consented, but when Ely asked the name of the company urologist Ballard said he could choose his own because he would have to pay for his services.[24] On Monday, November 10, Ballard instructed his secretary to call Ely and ask for the name of his doctor. Ely answered that he was not at liberty to release that information to her. Thereafter Ballard talked to UPS "several times."[25] A letter discharging Ely was sent by the Company on November 11, and received November 13. The reason given was, "Your continued refusal to comply with previous panel decisions." Thereafter Ely filed a grievance concerning his termination. The minutes of

[24]Ballard testified that he "represented" UPS, and performed all of their physicals. According to Ballard he conducted a standard history and physical examination of Ely on November 7 during which Ely stated that for several months he had found it necessary to urinate six to seven times during "waking hours" and once at night. Ballard flatly declared that this was abnormal, despite the fact he agreed that tension, the diuretic effect of the caffeine in coffee, and the jostling of a tractor trailer (about which he did not question Ely), were all factors which would tend to accelerate the need to urinate. Nevertheless, Ballard concluded that Ely had "a possible prostate problem." In addition, without conducting any psychological examination, he reported to the Company on the Medical Examination Form that Ely had "paronia" (sic). Finally Dr. Ballard's demeanor while testifying on direct examination was that of one who was eager to please his employer. He likewise became irritable and hostile on direct examination. Under all the circumstances presented, but mainly based on the incomplete inquiry into Ely's condition and Ballard's obvious strong bias in favor of the Respondent, I have given little weight to his testimony.

[25]He did not specify when these conversations occurred, nor did he relate their details. In a letter to UPS dated November 11, *received November 17,* Ballard's receptionist reported her conversation with Ely to the Company.

the J.S.C. proceeding show that the panel's decision was, "Based on both the timeliness question and the facts presented, claim of the union is denied."

E. Analysis and Concluding Findings

The General Counsel and the Charging Party contend that the record shows Respondent engaged in a pattern of conduct calculated to rid itself of a troublesome activist. They contend that Ely's efforts to secure for himself and other drivers the right to make necessary stops to heed nature's call, and his activities on behalf of PROD, constitute protected concerted activities, and that Respondent clearly retaliated against Ely because of these activities, thereby violating the Act. Respondent argues that Ely's conduct was not protected concerted activity, and that he simply defied his employer's instructions, which necessitated his discharge. Respondent also contends that the J.S.C. decisions upholding Ely's discharge, and also the panel decisions concerning Ely's September 26 warning, October 2 and November 11 discharges, and November 3 and 5 suspensions, should be deferred to under the Board's *Spielberg* doctrine.[26] The General Counsel and the Charging Party answer this defense by asserting that the standard enunciated in *Spielberg* have not been met, since the requirements of a fair and regular hearing and lack of repugnancy to the policies of the Act have not been satisfied by the J.S.C. proceedings. They also urge that Respondent refused to waive the untimeliness of Ely's discharge grievance, and that the J.S.C. decision was based in part on that factor, making deferral inappropriate.

[26] *Spielberg Manufacturing Co.*, and *Raytheon Co., supra.*

In *Spielberg* the Board held that it would defer to arbitration awards if the proceedings were fair and regular, the parties agreed to be bound, and the award was not repugnant to the Act. The additional requirement that the unfair labor practice issue before the Board must also have been raised in the arbitration proceeding and have been considered by the arbitrator, was the product of the *Raytheon* case. With respect to the question of whether or not a fair and regular hearing was held, in *Denver-Chicago Trucking Co.*, 132 NLRB 1416, the Board decided that Teamster joint committee decisions would be treated as arbitration awards, and that the absence of a neutral member on a bipartite panel equally divided between management and union representatives does not preclude deferral. This decision has been reaffirmed in *Terminal Transport, Inc.*, 185 NLRB 672, where the arbitration panel was composed solely of representatives of the employer involved and the union; and in *McLean Trucking Co.*, 202 NLRB 710, reversed by the U.S. Court of Appeals for the District of Columbia in *Banyard v. N.L.R.B.*, 505 F.2d 342 (1974), which Board decisions I am obligated to follow. It is clear that in the grievance proceedings relating to Ely's warning letter, October 2 discharge, and subsequent suspensions and discharge on November 10 all parties agreed to be bound and that all issues were raised before the panel, including Ely's claim to have been discriminated against because of his activities in asserting what he deemed his contractual rights and in sponsoring PROD. There is no evidence that Ely was impeded in the presentation of his case. He desired to present his own case and was permitted to do so. There is no evidence of conflict between Ely and the Union except for the tenor of Ely's January 9, 1976 letter to Silvers, the president of Local 651 concerning his up-

coming hearing on January 14. The record clearly shows that on many occasions the Union won grievances on Ely's behalf, and I cannot infer that the Union did not fairly represent Ely in his final grievance proceeding simply because his employer had learned of his PROD activities or because of matters outside the scope of the record, such as the widely publicized alleged dispute between PROD and the hierarchy of the Teamsters. Thus, the grievance proceedings relating to Ely's warning letter, October 2 discharge and subsequent suspensions and discharge on November 11 appear to be fair and regular. However, I find that deferral to the award of the J.S.C. in Ely's November 11 discharge case is inappropriate since it is clear that Respondent never waived its defense that this grievance was untimely, and the minutes of that grievance proceeding clearly show that the decision of the panel was based in part on that ground. Cf. *The Detroit Edison Company,* 206 NLRB 898. Moreover, I find that deferral would also be inappropriate concerning this award and the other awards involving Ely's warning letter, October 2 discharge, and suspensions since I find that Respondent's conduct toward Ely was in retaliation for his persistent efforts to implement J.A.C. awards pursuant to the contractual grievance procedure. Such conduct strikes at the very heart of the grievance and arbitration machinery. *Joseph T. Ryerson & Sons, Inc.,* 199 NLRB 461. Moreover, the Respondent's continuing discrimination against Ely in the face of repeated grievance awards establishing that drivers were entitled to make rest stops to heed the call of nature, raises serious doubt as to the sufficiency of the J.A.C. decisions upon which Ely's case arises as to make deferral unwarranted. *Shippers Dispatch, Inc.,* 223 NLRB No. 52. Since Ely's activities in pursuing his rights and those of others under the contract constitutes

both union activity and protected concerted activity in violation of the Act, as discussed further below, I find that the awards of the J.S.C. with respect to Ely's warning letter of September 26, discharge of October 2, November 3 and 5 suspensions, and his November 11 discharge are repugnant to the policies of the Act.

The record shows that in recent years the Respondent's Lexington terminal has had difficulty meeting its schedules and thus sought to reduce meet point delays by stringently enforcing the rest period provisions of the contract. When Ely resisted the Company's efforts to encroach on drivers' needs to stop at a restroom he became a target for persuasive pressures. The record is replete with evidence of supervisors threats to get Ely if he continued to pursue his activities. Some of this evidence is outside the statutory limitations period of Section 10(b) and some is not. In any event it has long been settled that pre-10(b) evidence may be considered to explain and illuminate events within the 10(b) period. When the 1974 J.A.C. grievance awards, in cases brought by Ely, specifically gave drivers the right to stop to relieve themselves so long as they used restroom facilities which would result in the least amount of lost time, Respondent began a program of almost continuous surveillance and harassment of Ely in an effort to either deter his activities or remove him. In doing so Respondent deliberately interpreted the 1974 J.A.C. decisions about rest stops in such a manner that they could not be followed, a manner strongly reminiscent of *Catch 22.* Hatcher testified:

> Q. Where could Mr. Ely have stopped between Corbin and Knoxville that day that would not have been excessive? He couldn't have stopped any place, could he? Any place he

stopped it would have been unscheduled, wouldn't it?

A. I don't understand. I don't understand the question.

Q. You said the stop at the Jellico Mountain or down at Lake City would have been an excessive and unscheduled stop. I said where could Mr. Ely have stopped that day between Corbin and Knoxville that would not have been excessive?

A. I don't — Where could he have stopped?

Q. Yeah. Could he have stopped any place?

A. Yes.

Q. Where?

A. There were several more exits or whatever.

Q. Okay. So if he had drove on to LaFolette would that have been excessive if he had pulled off the road at LaFollette. There is not a rest area there. He would have had to pull the interstate, would he not?

A. Yes, he would have to pull off the interstate.

Q. Would that have been excessive?

A. Yes.

Q. Okay. If had drove further on down the interstate and pulled off the interstate would that have been excessive?

A. Yes.

Q. Well, where could he have stopped between Corbin and Knoxville that would not have been excessive?

A. That is the whole point. He couldn't have stopped.

Furthermore, the evidence leaves no doubt that Respondent's enforcement of the J.A.C. decisions in this way was directed at Ely, because of the frequency with which supervisors monitored Ely's work and because the warning letters issued to other drivers were rescinded. The obvious embarrassment of Jones and Hatcher, who were unable to provide these drivers with a logical explanation of the Company's "unscheduled" stop policy, serves to emphasize the fact that by warning others the Company only wished to conceal that Ely was being singled out for establishing the privilege which other drivers had been enjoying with the full knowledge of their supervisors. Finally the manner in which the Company sought to cloud the true issue surrounding Ely's termination by suspending Ely, and requiring him to take a cursory medical examination in which he was pronounced abnormal and after numerous phone calls to the Company was diagnosed to have "probable prostatitis" and paranoia, simply defies credulity.

The law is well settled that when a single employee engages in lawful activity to assert the rights of all employees under a collective-bargaining agreement, he is engaging in protected concerted activity, even if his interpretation of the contract should be mistaken. *Interboro Contractors, Inc.*, 157 NLRB 1295; *Ben Pekin Corporation*, 181 NLRB 1025. Since the Company clearly engaged in a campaign of harassment and other retaliation against Ely for pursuing his contractual rights, including issuing him a warning letter dated September 26 which it failed to rescind, discharging him on October 2 (later reduced to a suspension), suspending Ely on November 3 and 5, and permanently discharging

him on November 11, the Respondent violated Section 8(a)(1) of the Act, and I so find. I am also persuaded that the Respondent was motivated, in part, to terminate Ely on November 11 because of his activities on behalf of PROD, as indicated by the timing of Ely's termination, together with the credible evidence that the Company knew Ely was organizing for PROD and threatened to "get" Ely if he continued these activities. It is firmly established in the law that employees engage in protected concerted activities when they act lawfully for their mutual aid and protection. Although PROD is not a labor organization, it seeks to promote safe and healthy working conditions for drivers, which goals fall well within any definition of the phrase "mutual aid and protection" in Section 7 of the Act. Thus Respondent violated Section 8(a)(1) of the Act in this respect. Lastly, because the activities for which Ely was penalized included union activities, i.e., the filing and processing of grievances under the collective-bargaining agreement, I find that the Respondent also violated Section 8(a)(3) of the Act.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Teamsters Local Union 651, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a warning letter to Ren David Ely dated September 26, by discharging and thereafter suspending

Ely for 30 days on October 2, by suspending Ely on November 3 and November 5, and by discharging him on November 11, Respondent violated Section 8(a)(1) and (3) of the Act.

4. The unfair labor practices of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act in any respect other than those specifically found.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order that the Respondent cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged Ren David Ely, I find it necessary to order that the Respondent offer him full reinstatement with backpay computed on a quarterly basis, plus interest at 6 percent per annum as prescirbed in *F. W. Woolworth Company,* 90 NLRB 289, and *Isis Plumbing & Heating Co.,* 138 NLRB 716, for the period of his suspensions and from the date of discharge to the date of proper offer of reinstatement. I shall also order the Respondent to post an appropriate notice with respect to the violations of Section 8(a)(1) and (3) of the Act found to have occurred.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section

10(c) of the Act, I hereby issue the following recommended:[27]

ORDER

The Respondent, United Parcel Service, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

a. Discharging, suspending, issuing written warnings, threatening to discharge, or otherwise discriminating against any employee for the purpose of discouraging employees from engaging in union activity or concerted activity for their mutual aid or protection.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Ren David Ely immediate and full reinstatement to his former position or, if such position

[27]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings in the manner set forth in "The Remedy."

(b) Rescind, and delete from its personnel records the written warning issued to Ren David Ely dated September 26, and any such records related to his subsequent suspensions.

(c) Preserve and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility at Lexington, Kentucky, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by an authorized representative of the Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order what steps the Respondent has taken to comply herewith.

[28]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C.

/s/ Richard L. Denison
Richard L. Denison
Administrative Law Judge

APPENDIX
FORM NLRB-4727
(9-69)

JD-855-76

NATIONAL LABOR RELATIONS BOARD

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

AFTER A TRIAL IN WHICH ALL PARTIES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN DECIDED THAT WE VIOLATED THE LAW, AND WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT discharge, suspend, issue written warnings to, threaten to discharge, or otherwise discriminate against employees for the purpose of discouraging employees from engaging in union activity or concerted activity for their mutual aid or protection.

WE WILL offer Ren David Ely immediate and full reinstatement with backpay.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and

to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

UNITED PARCEL SERVICE, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 3003, 550 Main Street, Cincinnati, Ohio 45202, Telephone (513) 684-3634.

APPENDIX C

234 NLRB No. 85

FJM
D–2353
Lexington, Ky.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED PARCEL SERVICE, INC.

and Case 8–CA–9778

REN DAVID ELY, an Individual

DECISION AND ORDER

On December 28, 1976, Administrative Law Judge Richard L. Denison issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and briefs, the General Counsel filed cross-exceptions and a brief, the Charging Party filed a reply to Respondent's exceptions together with a brief, Respondent filed an answering brief to the General Counsel's cross-exceptions and a motion to strike certain attachments included in the Charging Party's reply, and the Charging Party filed a reply to Respondent's motion to strike.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, briefs, motions,[1] and

[1]Absent valid grounds for including in the record the edition of the newspaper which was published subsequent to the close of the hearing and which the Charging Party attached to its reply brief, we hereby grant Respondent's motion to strike said attachment.

The Charging Party filed a "Motion to Disqualify Member Walther" from participating in the instant proceeding and Respondent filed a response thereto. We hereby deny the motion inasmuch as former Member Walther did not participate in the adjudication of this case.

replies, and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

[2]Chairman Fanning and Member Jenkins do not agree with, and do not adopt, the findings which the Administrative Law Judge has accorded the documentary evidence pertaining to, and the testimonial evidence given by, Dr. Ballard. Their position is not directed to, and does not disturb, any of the Administrative Law Judge's credibility resolutions which, however, Respondent has attacked generally.

It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

[3]We agree, albeit for varying reasons, that the Administrative Law Judge correctly concluded that deferral to the decisions of the joint Union-Employer panel concerning Ely's warning, suspensions, and discharges is not warranted under the deferral policy set forth in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955), and *Raytheon Company*, 140 NLRB 883 (1963). Chairman Fanning and Member Murphy, however, find it unnecessary to adopt *in toto* the reasons assigned therefor by the Administrative Law Judge and find, instead, that deferral is inappropriate solely because the panel's decision relating to Ely's final discharge was grounded partially on procedural "timeliness" grounds rather than strictly on substantive grounds.

Member Jenkins agrees that while the procedural grounds utilized by the panel renders deferral inappropriate, much of the rationale utilized by the Administrative Law Judge for not deferring repeats Member Jenkins' dissents in *Terminal Transport Company, Inc.*, 185 NLRB 672 (1970), *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971), and their progeny.

Our dissenting colleague maintains that, "regardless of any unlawful conduct directed at Ely prior to the [voiding] incident," Ely was discharged for cause solely because he voided in the cab of his tractor while driving and thereby exceeded acceptable standards of behavior and also jeopardized his and his supervisor-passenger's safety. This position, however, never was espoused by Respondent, which argued at both the hearing and in its brief that Ely was discharged because he repeatedly refused to follow instructions. As stated by Division Manager Jones:

> Well, Mr. Ely had returned to work on November 3rd after a thirty day suspension for failing to follow instructions. When he came to work on November 3rd he again failed to follow management's instructions, refused to pull the trailer without valve caps, refused to go on his run without a tape recorder, he was suspended, he came back to work the next day on November the 4th, he left the interstate highway system and made unscheduled stops, which was in complete disregard of the JAC decision. November the 5th he made an unscheduled stop. He did urinate in the tractor. November the 7th he had went to the company doctor and refused to follow the instructions of the doctor. And I made a decision at this point that I had done everything that I could for this individual and he just completely refused to follow management's instructions, even instructions of a professional doctor and it was evidence [sic] that he was not going to follow instructions of management.

Respondent further states in its brief that "In the clear field of vision that hindsight provides, Ely should have been discharged then [because of the voiding incident].

But the Company chose to give Ely the benefit of the doubt again and referred him for medical examination."

Moreover, Ely advised his superior that he had to stop to answer nature's call and was told he would be fired if he did. Forced by Respondent to choose between discharge and urinating in the truck cab, Ely chose the latter.

Member Murphy ignores Respondent's role and motivation in this incident and focuses only on Ely's conduct; that she may do, but that does not make her analysis that of the majority. As in a constructive discharge case, Respondent's shifting of the immediate responsibility for the precipitating act does not relieve it of its legal responsibility.

Accordingly, for the reasons set forth by the Administrative Law Judge we find that Ely's discharge was violative of Section 8(a)(3) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, United Parcel Service, Inc., Lexington, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C., January 26, 1978.

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

MEMBER MURPHY, concurring in part:

I cannot agree with my colleagues' finding that Respondent unlawfully discharged Ren David Ely.[4] Ely's conduct in voiding on the floor of the truck as he was driving which caused the trailer to swerve across the highway was in such disregard to safe driving standards as to negate any implications that the discharge was not caused by that conduct.

Ely's discharge was precipitated by an incident which occurred on November 5, 1975. On that date, Ely was accompanied by Supervisor Hatcher on his regular run to and from Knoxville, Tennessee. Ely made an unscheduled stop to relieve himself at Jellico Mountain on the way to Knoxville. At that time Hatcher said he would fire Ely if he made further unscheduled stops, Hatcher asserting that such stops were inconsistent with previous arbitration panel decisions.[5] Ely responded that he had to relieve himself and that in his opinion his stopping was consistent with the panel decisions. On the return trip, Ely and Hatcher made their regularly scheduled stop. Thereafter, as they approached the Berea rest area, Ely told Hatcher he had to stop to relieve himself. Hatcher answered, "You do and you are fired." Ely drove on for 15 to 30 minutes until he reached the exit ramp *just a few minutes from the terminal.* At this point Ely remarked that he had to void "now" and proceeded to do so in the cab of the truck as he

[4]Member Murphy agrees that deferral to arbitration is inappropriate since the arbitration panel's decision relating to Ely's final discharge was based on procedural grounds of "timeliness," rather than strictly on substantive grounds.

[5]The matter of unscheduled stops had been a source of contention for some time, particularly between Ely and Respondent. The latter interpreted the arbitration decisions as upholding its position.

steered with one hand down the curved exit ramp. Hatcher yelled for him to watch out as the truck swerved across the crack between the edge of the ramp and the concrete shoulder. As they halted at the stop sign at the bottom of the ramp, Hatcher screamed, "David, I don't believe you did that!" When they arrived at the terminal Ely was suspended and instructed to see the company physician, Dr. Ted Ballard. On Friday, November 7, Ely saw Ballard, whose diagnosis was that Ely had a possible prostate problem and that Ely had paranoia. On November 11, the Company discharged Ely by letter of that date, giving as the reason for such action Ely's "continued refusal to comply with previous panel decisions."

It is true that Respondent and Ely had for some period of time been at odds over the matter of unscheduled stops at restroom facilities, that supervisors had made threats to get Ely if he continued to do so, that he was kept under close scrutiny, and that he had engaged in Professional Driver's Council (PROD) activities, as well as union activities. It also may be said that Respondent did not regret Ely's involuntary departure from its employ in light of his protected activities. But, in the face of what can only be described as Ely's unsafe conduct which placed his and Hatcher's lives in jeopardy, it does not follow — nor is there any basis for finding — that his discharge was caused in part or whole by his protected concerted and/or union activities, as found by the Administrative Law Judge. To the contrary, the bad driving occasioned by the voiding incident provided such an impelling reason for discharging him that there can be no doubt that his protected activities played no part in Respondent's decision to ter-

minate his employment.[6] Indeed, Ely's conduct in voiding in the cab of the truck as he was driving off the interstate highway – when only a few minutes from the terminal – was so opprobrious and reckless it can only be concluded that Ely deliberately set out to provoke Respondent into taking some form of disciplinary action against him. In the circumstances, Respondent showed remarkable restraint in initially only suspending Ely pending a doctor's examination. When this examination failed to indicate anything which could explain Ely's exceedingly unusual conduct, Respondent took the perfectly reasonable course and discharged him.

Despite Ely's dangerous conduct, my colleagues would affirm the Administrative Law Judge's findings, apparently on the basis that, if an employer wants to part company with an employee whose union or protected concerted activities have made him *persona non grata,* the subsequent discharge of that employee must necessarily be found to be unlawful. This is contrary to Board precedent. Thus, in *Klate Holt Company,* 161 NLRB 1606, 1612 (1966), the Board stated:

> The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he

[6]The citing in the discharge letter of "refusal to comply with previous panel decisions" as the reason for discharging him does not indicate improper motive. Ely was required to follow those decisions, apparently had not on earlier occasions, and clearly did not on November 5. Further, even if the given reason for Ely's discharge may create a suspicion that the discharge was for protected activities, the moving cause is so strong as to completely negate that suspicion. *Alpers' Jobbing Company, Inc.,* 231 NLRB No. 57 (1977).

> would have been terminated in any event, and the employer discharges him for that reason, the circumstance that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful.

The above-quoted language aptly describes the situation presented in this case. It therefore bears repeating that, however much Respondent might have welcomed the opportunity to discharge Ely, his termination directly stemmed from the voiding incident in which his conduct exceeded any normal or acceptable standards of behavior and failed to meet any test of responsible and safe driving. That Respondent so viewed the situation is evidenced by Hatcher's expression of astonished disbelief at the time the incident occurred, Ely's immediate suspension upon completing his run, and Respondent's having him examined by its doctor to determine whether his conduct could be medically excused before taking the final step of discharging him. In such circumstances, and regardless of any unlawful conduct directed at Ely prior to the incident in question, I am unable to find that Ely was discharged for other than cause.[7]

[7]*Alpers' Jobbing Company, Inc., supra.* My colleagues argue that I am espousing a position not urged by Respondent. In support of this they refer to the fact that Respondent points to other failures by Ely to follow orders prior to the voiding incident and his failure to follow doctor's orders after the incident in support of its decision to discharge Ely.

Respondent has consistently urged that the voiding incident precipitated the discharge. However, discharges do not take place in a vacuum. It is not unusual that Respondent should also point to Ely's other failings as the context in which the discharge occurred. Doing so is not in any way inconsistent with Respondent's basic position. Further, as to the failure to follow doctor's orders, that is more realistically viewed as part of the voiding incident and represents merely a notation by Respondent that it gave Ely a chance to avoid the consequences of his conduct, something he refused to do.

Accordingly, I would reverse the Administrative Law Judge's finding that Ely was unlawfully discharged.

Dated, Washington, D.C., January 26, 1978.

Betty Southard Murphy, Member
NATIONAL LABOR RELATIONS BOARD